In the Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS W. NEALON,

PETITIONER,

v.

HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, A CORPORATION,

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner and his counsel appreciate that certiorari is not granted as a matter of right, but is granted only when there are special and important reasons therefor, and then as limited by subdivision 5 of Rule 38 of this Honorable Court.

Petitioner and his counsel believe that the Circuit Court of Appeals has erroneously decided an important question of federal practice, which, in its application to the question involved in this administrative proceedings in equity not closed, has not been, but should be, settled by this court; and furthermore that the Circuit Court of Appeals has decided an important question of federal practice pertaining to such proceedings in a way probably in conflict with applicable decisions of this court.

This court does grant certiorari to settle questions of practice presented under the Rules of Civil Procedure.[8]

The opinion of the Circuit Court of Appeals discloses that the receiver, as appellee in that court, moved to dismiss the appeals, in part, because petitioner waived his right to appeal from the order of December 7, 1942 by accepting the benefits of the order.

Since the Circuit Court of Appeals disposed of the appeals upon jurisdictional questions only, that court thought the question of waiver arising from accepting the benefits of the order of December 7, 1942, need not be considered. (R. 706).

If our understanding is correct, the decision of the Circuit Court of Appeals by foregoing that question removes the necessity of discussing it upon this petition for certiorari. The question did not enter into the judgment of the Circuit Court of Appeals dismissing the appeals.

Assuming, but not conceding, that petitioner will not succeed in contesting the issue of waiver arising from accepting payment under the order of December 7, 1942, nevertheless, we submit, the succeeding pages will disclose that petitioner, at least, is entitled to be heard upon that issue.

In the event this petition for certiorari is grant-

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[8] *Leishman* v. *Associate Wholesale Electric Co.*, 318 U. S. 203, 87 L. Ed. 714, 63 S. Ct. 543.
Zimmern v. *United States*, 298 U. S. 167, 80 L. Ed. 1118, 56 S. Ct. 706.

ed, and this Honorable Court concludes that the question of waiver arising from accepting the benefits of the order should be considered and disposed of, then petitioner respectfully requests that an opportunity be accorded him to present his position on that question by supplemental brief.

BRIEF SUMMARY OF FACTS

Petitioner rendered extensive services for petitioning creditors in a class suit which eventuated in the appointment of a receiver by the district court for Intermountain Building and Loan Association, an Utah corporation, which operated in several western states. The extent of those services is portrayed by the petition filed by petitioner on October 15, 1937 for solicitor's fees and expenses incurred in the preparation and trial of the creditors' suit. (R. 108).

Upon the successful termination of the creditors' suit, petitioner was appointed counsel for the first receiver by the district court. (R. 378). The petition filed by petitioner on October 15, 1937 was confined to services rendered in the creditors' suit. Petitioner did not then request compensation for services rendered by him to the receiver and in the ancillary receiverships. (R. 160, 161).

Nonetheless, the order entered by the trial court on December 7, 1942, purported to be a final order compensating petitioner for services rendered not only in the creditors' suit but also in the receivership proceedings. (R. 243-248). The district court by the order entered December 7, 1942, awarded

petitioner $12,500.00, less $7,500.00 which had already been paid to him. (R. 243).

An award in the same amount in this proceeding was also made to Elizabeth G. Monaghan for similar services. (R. 239). She appealed to the Circuit Court of Appeals from the order making the award to her and that court reversed the district court and fixed her compensation in an amount not less than $50,000.

Monaghan v. *Hill,* 9 Cir., 140 Fed. 2d 31.

The opinion in that case discloses that experienced attorneys fixed the value of petitioner's compensation in the creditors' suit alone at not less than $100,000. The opinion further discloses that as a result of the efforts of petitioner and his co-solicitor, gross assets of Intermountain Building and Loan Association valued at more than $2,000,000 passed into the hands of the receiver, and that almost 3000 creditors of the association elected to avail themselves of the benefits of the suit. In appraising the value of these services, the Circuit Court of Appeals said:

> Although the efforts of the two attorneys were vigorously resisted in every way possible, the results of the litigation were highly satisfactory. A receiver was appointed by the federal District Court to handle the assets of the corporation. Gross assets valued at more than two million dollars passed into the hands of the receiver; probably all would have been dissipated by the Association had it not been for the work of the two attorneys mentioned. Almost three thousand creditors

> of the Association elected to avail themselves of the benefits of the suit. (*Monaghan* v. *Hill,* 140 Fed. 2d. 32, 33).

Petitioner did not appeal from the order of December 7, 1942, awarding compensation to him. He did file a petition on March 31, 1944 to rehear that order. (R. 599). Petitioner then, for the first time, requested compensation for services he had rendered to the receiver first appointed and compensation for services he had rendered in the ancillary receivership proceedings, which extended to California, Idaho, Oregon, Utah and Wyoming. (R. 601). The petition filed March 31, 1944 to review the order of December 7, 1942 was supported by the affidavit of petitioner wherein he recited the extent of the services rendered by him to the receiver, and in the ancillary receivership. (R. 620-631). Petitioner estimated the reasonable value of his services in that behalf at $40,500. (R. 631).

The petition filed October 15, 1937 for solicitor's fees in the creditors' suit was not traversed. Testimony of the several attorneys as to the value of those services was uncontradicted. Petitioner's affidavit (R. 620) which accompanied the petition filed March 31, 1944, to rehear the order of December 7, 1942, and for compensation for services performed to the receiver, and in the ancillary receiverships, was not controverted save as the petition was controverted by the answer of the receiver. (R. 632).

The order of December 7, 1942, recited that it constituted payment for services rendered by petitioner to the receiver. (R. 247). Although petitioner did not then request the district court for com-

pensation for services rendered to the receiver, the order of December 7, 1942, by purported finality, deprived him of the opportunity to be heard on the value of those services. Petitioner's claim of compensation for those services was first presented to the court by the petition of March 31, 1944 (R. 599) which the district court entertained and denied with prejudice. (R. 657).

SUMMARY OF THE ARGUMENT

Notwithstanding petitioner did not appeal in time from the order entered December 7, 1942, which purported to be a final order awarding petitioner solicitor's fees for services performed in the creditors' suit, and also for services performed to the receiver, nevertheless the district court, by entertaining, considering and disposing of the petition filed out of time on March 31, 1944 to rehear the order of December 7, 1942, opened that order for appeal to the Circuit Court of Appeals.

(Specification of Error No. 1, page 9, supra.)

The Circuit Court of Appeals has decided that the appeal from the order of December 7, 1942 was too late. The appeal was taken from that order on December 7, 1944. (R. 666). The trial court entertained the petition filed March 31, 1944 (R. 599) to rehear the order of December 7, 1942. That petition, after entertainment, was dismissed by the district court November 29, 1944 with prejudice. (R. 657). Obviously the petition could not have been dismissed with prejudice unless the trial judge had entertained and considered it. The trial judge ordered a pre-trial conference upon the pe-

tition and answer filed by the receiver which resulted in the formulation of the issues then presented, and those issues as formulated were adopted by an order of the district court. (R. 643-651). Thus in every essential detail there was a trial of the issues.*

The proceedings had in the district court on the petition of March 31, 1944 enlarged the time to appeal to the Circuit Court of Appeals from the order of December 7, 1942. Consequently, petitioner appealed on December 7, 1944 to the Circuit Court of Appeals both from the order of December 7, 1942, and from the order of November 29, 1944 dismissing the petition filed March 31, 1944 to rehear the order of December 7, 1942. (R. 666).

Petitioner asserted in the Circuit Court of Appeals that the district court, by entertaining, considering and dismissing with prejudice the petition filed March 31, 1944 to rehear the order entered December 7, 1942, enlarged the time to appeal from that order to the Circuit Court of Appeals under the rule of the following decisions of this court:

> *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.
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> *Bowman v. Loperено,* 311 U. S. 262, 85 L. *Ed.* 177, 61 S. Ct. 201.
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> *Pfister* v. *Northern Illinois Finance Co.*, 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

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*The proceedings had in the district court on the petition filed March 31, 1944 are set forth in sequence at pages 5 and 6, supra.

The Circuit Court of Appeals, by its opinion, concluded that those decisions apply only to bankruptcy proceedings and are not applicable to this administrative proceedings in equity. (R. 706). The Court of Appeals for the District of Columbia and the Circuit Court of Appeals for the First Circuit came to similar conclusions.[10]

It is true that *Wayne United Gas Co.* v *Owens-Illinois Glass Co., Bowman* v. *Lopereno,* and *Pfister* v. *Northern Illinois Finance Co.,* cited above, treat with bankruptcy proceedings. They hold that a petition to rehear a final order in bankruptcy, although filed out of time, if entertained, reopened the order for appeal and that the time for appeal begins to run from the date of the entry of the order disposing of the petition for rehearing. The rule of decision announced in those cases is not peculiar to bankruptcy, but, on the contrary, is a rule of equity which this court applied to bankruptcy proceedings.

For illustration, in *Wayne United Gas Co.* v *Owens-Illinois Glass Co.,* it appears that in a bankruptcy proceedings a petition for reorganization was dismissed March 2nd. On April 24th petitioner presented a petition to the district court praying for vacation of the order of March 2nd and for a rehearing. On May 12th the district court set aside

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[10]*Safeway Stores, Inc.* v. *Coe, Commissioner,* 136 Fed. 2d 771; *Jusino* v. *Morales & Tio,* 139 Fed. 2d 946. In the Jusino case the court thought the matter was not free from doubt but followed the rule in the Safeway Stores case. In the Safeway Stores case, Miller J. sharply dissented by distinguishing between motions for new trial and motions for rehearing.

the order of March 2nd, granted a rehearing and fixed May 22nd for a hearing of all questions. On May 22nd petitioner presented a second petition for reorganization. On May 28th the district court dismissed the petitions. On June 11th petitioner applied for appeal which was granted. The Circuit Court of Appeals dismissed the appeal as being out of time. This court reversed. In addressing itself to the power of a district court to entertain a petition for rehearing in equity, filed out of time, as tolling the time for appeal, this court (300 U. S. 136-137) said:

> "A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after an appeal has been perfected and after the time for appeal has expired, but not after the expiration of the term at which the decree was entered. It is true the bankruptcy court applies the doctrines of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable, the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended. * * * But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within

> the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. * * *"

Except as to terms, the situation in this equity proceedings is exactly the same as it was in the foregoing bankruptcy proceedings. Obviously the rehearing of the order of December 7, 1942, was not entertained for the purpose of appeal. The petition to rehear that order (R. 599) in a forthright way pointed out the claimed errors of the order, as the petition will reveal. The petition was supported by the affidavit of petitioner (R. 620) which in addition substantiated petitioner's claim of compensation to the receiver and in the ancillary receiverships which he had not theretofore claimed. Respondent, as receiver, answered the petition *in extenso*. (R. 632). These were followed by pretrial conference (R. 643) and decision unfavorable to petitioner. (R. 653). In every respect it appears that the proceedings were not simulated and no suggestion has been made by anyone that they were.

So, we revert to the Wayne case (300 U. S. 137) and find in the decision this significant holding:

> "* * * the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening

> rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; *and even though it reaffirm its former action and refuse to enter a decree different from the original one,* the order entered upon rehearing is appealable and the time for appeal runs from its entry." (Italics supplied).

In *Bowman* v. *Lopereno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201, above cited, it is said:

> " * * * The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."

It is difficult to reconcile the decision of the Circuit Court of Appeals and the foregoing decisions of this court. The fact is the rule there announced by this court is a rule of equity. It may only be distinguished by the assertion that courts of bankruptcy are courts without terms, whereas courts of equity are courts with terms, and that consequently since the term had expired, the petition of March 31, 1944 to review the order of December 7, 1942 came too late.

But since the adoption of the Rules of Civil Procedure, effective September 16, 1938, the inhi-

bition of terms of court in their application to administrative proceedings in equity, as here, are removed as we shall seek to show by the next subdivision of this brief.

II

In view of Rule 6 (c) of the Rules of Civil Procedure, the expiration of the term of court in no way affects the power of a district court to do any act or take any proceeding in a civil action which is pending before it.

(Specifications of Error No. 2, page 9, supra.)

Rule 6 (c) of the Rules of Civil Procedure[11] was designed to eliminate the difficulties caused by the expiration of terms of court.[12] The taking of a proceeding pending before the district court is not now affected or limited by the expiration of terms of court. Rehearing of orders in an administrative proceeding in equity not closed are not now affected or limited by the expiration of the term as was the case under the former equity practice. Thus receivership proceedings in equity, like bankruptcy proceedings, are not now affected or limited by terms of court. Accordingly, rehearing of orders in receivership proceedings in equity stands like rehearing of orders in bankruptcy proceedings.

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[11]Rule 6 (c): UNAFFECTED BY EXPIRATION OF TERM. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

[12]Notes of Advisory Committee, Title 28 USCA, Rule 6, following § 723 (c).

Rule 59 (b) of the Rules of Civil Procedure provides that a motion for new trial shall be served not later than 10 days after the entry of judgment.[13] Subdivision (a) (2) of Rule 59 provides that a new trial may be granted in an action tried without a jury for any of the reasons for which rehearings have heretofore been granted in suits in equity. The notes of the advisory committee state that this rule represents an amalgamation of the petition for rehearing of Equity Rule 69 and the motion for a new trial of Title 28 USCA, Rule 59, following § 723 (c).

Equity Rule 69 provided that no rehearing could be granted after the term at which the final decree of the court was entered and recorded.[14] But terms of court are now anachronistic.

> *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777.

Accordingly, since the rule of decision in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co., Bowman* v. *Lopereno, and Pfister* v. *Northern Illinois Finance Co.,* supra, is drawn from equity, then a court of equity may now grant a rehearing and vacate, alter or amend its order or decree after the term has expired, providing no intervening or adverse right has vested on the faith of the order or decree. In view of the nature of the order here no such right has vested or could vest. No reason is

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[13]Rule 59 is printed in the appendix at pages 35, 36.

[14]Equity Rule 69 is printed in the appendix at page 36. The words "the final decree" appearing in the rule apparently mean the last decree which effectively closes the suit, not interim decrees although *pro tanto* final.

perceived why that order could not have been reheard by the district court, as it was reheard by that court, and having been reheard, the order was opened for review by the Circuit Court of Appeals for the errors asserted in that court.

The inequity of the order of December 7, 1942 was directly drawn in question by the petition filed March 31, 1944 to rehear it. (R. 599). The order of November 29, 1944 (R. 657) which dismissed the petition to review the order of December 7, 1942, was directly drawn in question by the appeals to the Circuit Court of Appeals, as was the order of December 7, 1942. Consequently the dismissal of the appeals by the Circuit Court of Appeals because the petition of March 31, 1944 to rehear the order of December 7, 1942 was filed after expiration of term is wrong, measured by Rule 6 (c) of the Rules of Civil Proceedure when that rule is integrated with the decisions of this court heretofore cited.

III

Rule 60 (b) of the Rules of Civil Procedure authorized the district court to relieve petitioner from the error of the order of December 7, 1942.

(Specification of Error No. 3, pps. 9, 10, supra.)

Rule 60 of the Rules of Civil Procedure is devised to relieve parties, under the circumstances therein provided, from judgments and orders.[15] The rule authorizes corrections of clerical mistakes in judgments and orders, or by relieving a party to

[15]Rule 60 is printed in the appendix at page 37. It is also printed at page 7, supra.

a judgment, order or proceeding from mistake, inadvertentance, surprise or excusable neglect, upon motion made not exceeding six months after the judgment, order or proceeding was taken. By exception (b) (1) of the rule the power of the court "to entertain an action to relieve a party from a judgment, order or proceeding" is not limited by time as that power is limited by the remainder of the rule.

It is said that this exception (b) (1) contained in Rule 60 is designed to preserve the common law remedy of bills of review and bills in the nature of bills of review.

> *Fraser* v. *Doing*, 76 U. S. App. D. C. 111, 130 Fed. 2d. 617.

The notes of the Advisory Committee, Rule 60, Title 28 USCA, following § 723 (c), do not disclose that exception (b) (1) of Rule 60 was designed to preserve the remedy of bills of review and bills in the nature of bills of review to the exclusion of other remedies.

In Cyclopedia of Federal Procedure, 2d Ed., Vol. 8, § 3599, last paragraph, p. 348, is found this comment:

> "Another distinction that was usually observed in equity practice prior to adoption of the Rules of Civil Procedure was that between the application for rehearing and the bill of review. The application for rehearing was available during the term of rendition of the decree, but after expiration of the term application usually had to be by bill of review or independent suit to enjoin

> enforcement. Since, under the Rules of Civil Procedure, the term of court at which a judgment is entered no longer fixes the period of the court's primary control over the judgment, and rehearing applications are placed upon the same basis as motions for new trial, there is nothing to be gained by further pursuing distinctions, now of no moment, between rehearing applications and bills of review."

The order of December 7, 1942 was entered in a receivership proceeding in equity. The receivership proceedings are still open and consequently the orders of the district court in the proceedings, even final orders, when no intervening rights have vested on the strength of them, are subject to the continuing control of the district court until the proceedings are finally closed. The name of the remedy is now unimportant.

The Circuit Court of Appeals thought the remedy invoked was an "action." (R. 706). The prayer of the petition filed March 31, 1944 (R. 618) to review the order of December 7, 1942 was broad enough to include an action as that word is used in Rule 60 (b) (1).

Fiske v. *Buder,* 8 Cir., 125 Fed. 2d 841, 844.

Cavallo v. *Agwilines,* 2 F. R. Dec. 526.

Prior to the decision of the Circuit Court of Appeals in this proceeding, that court gave Rule 60 a construction which supports the construction of it now contended for.

Bucy v. *Nevada Construction Co.*, 9 Cir., 125 Fed. 2d 213.

Bateman v. *Donovan*, 9 Cir., 131 Fed. 2d 759.

IV

Assuming the order of December 7, 1942 was final for the purpose of appeal, nevertheless it was not circumscribed by that character of finality that removed it from any further control by the district court.

(Specification of Error No. 4, page 10, supra.)

The order of December 7, 1942 was a final order for the purposes of appeal. It stands in the same position as the companion order appealed from in the Monaghan case.

Monaghan v. *Hill*, 9 Cir., 140 Fed. 2d 31.[16]

The right of appeal from orders awarding fees as between solicitor and client, payable from funds in the hands of the receiver, was settled long ago by this court.

Trustees v. *Greenough* (1881) 105 U. S. 527, 531, 26 L. Ed. 1157.

But we submit that *Trustees* v. *Greenough* decides that the orders there entered were *pro tanto* final for the purpose of appeal and not final in a sense that as of their entry they passed from further control of the court which entered them. The applicable part of the decision (105 U. S. 531) follows:

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[16]But compare *Heinze et al* v. *Butte Consolidated Min. Co. et al*, 9 Cir., 129 Fed. 337, 340. That case and the Monaghan case, both from the same court, are opposite.

> "The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. *The case is a peculiar one,* it is true; but under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision *substantially* a final decree *for the purposes* of an appeal." (Italics supplied).

It is apparent, having regard for finality, that the case was a "peculiar one" and that peculiarity may have prompted the court to qualify the finality of the order by describing it as "substantially a final decree for the purposes of an appeal". *Trustees* v. *Greenough* stands apart from the usual legal concept of final orders or decrees.[17]

It seems logical to say that the order here, as those in *Trustees* v. *Greenough,* although substantially final for the purpose of appeal, was not inflexibly final in the respect that the district court

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[17] *Collins* v. *Miller,* 252 U. S. 364, 40 S. Ct. 347, 64 L. Ed. 616; *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78, 44 S. Ct. 481, 68 L. Ed. 909.

had no further control over it so as to relieve the order from the inequity in it before termination of the administrative proceedings where it was entered. As of the time of the entry of the order of December 7, 1942, petitioner in his Ninth Circuit was not beleagured with perilous necessity of appealing from that order.

Heinze et al v. *Butte Consolidated Min. Co., et al,* (1904) 9 Cir., 129 Fed. 337, 340.

Petitioner should not fall under the impact of penalty for failure to appeal in time from the order of December 7, 1942, by confining him to that remedy exclusively, especially in view of the familiar rule "that there can be but one final decree in a suit in equity".

John Simmons Co. v. *Grier Bros. Co.,* 258 U. S. 82, 89, 42 S. Ct. 196, 66 L. Ed. 475.

We should hesitate to assert that had petitioner been over-compensated as a result of error by similar order, that the district court, in such circumstance, could not have revised the order by requiring petitioner to refund to the receivership estate the overpayment, even after the expiration of the term or after expiration of the time for appeal. Carried to its ultimate effect, the opinion of the Circuit Court of Appeals could lead to unfortunate consequences in this character of proceedings.

Receivership proceedings in courts of equity, like proceedings in bankruptcy courts, are continuing administrative proceedings. The very nature of receivership proceedings contemplates *ex vi*

necessitate the adjournment of terms until the settlement of the receiver's final account.

> *Wallace* v. *Fiske,* 8 Cir., 80 Fed. 2d 897, 901, 911.

Here the first receiver alone filed numerous petitions upon which orders were entered between December 2, 1935 and March 31, 1937. (Report of the first receiver, R. 525-576). Had terms intervened between those dates, the consequent confusion is at once apparent.

CONCLUSION

We believe this petition for certiorari presents questions of practice in administrative proceedings in equity sufficiently important to justify the granting of a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit dismissing petitioner's appeals in that court, and, accordingly, it is respectfully prayed that this Honorable Court grant the writ as prayed for in the petition.

Respectfully submitted,

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